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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

REPLY TO OPPOSITION

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removed from the *luggage compartment of a stationwagon.* In *Sanders* there was no arrest prior to the search; in our case there had been an arrest.

Petitioner submits that these distinctions do not make a constitutional difference since in each case the actions of the accused reasonably manifested an expectation that his privacy would not be violated without warrant. Respondent seizes upon these distinctions, urging that the manner of access to the luggage compartment and the type of sealed container do make a difference in this case. (*Opposition To Petition For Writ of Certiorari,* at p. 10 and pp. 12-13) Thus, irrespective of the Court's decision in *Sanders v. State of Arkansas, supra,* respondent's constitutional approach may nevertheless persist on the highways, in the trial courts, and in the appellate courts.

This type of constitutional ambiguity can and should be dealt with while the Court is presented with the opportunity. By demonstrating the operation of the constitutional rule in different factual settings, moreover, this Court definitively isolates the principle from the factual setting of a particular case and completes the outlines of the controlling constitutional principle. This Court did exactly this in its companion decisions in *Terry v. Ohio,* 392 U.S. 1 (1968), and *Sibron v. New York, Peters v. New York,* 392 U.S. 40, and the bench and bar have benefited from the application of the "stop and frisk" principle to the different facts of those cases.

This Court likewise benefits from the participation of additional counsel with different perspectives and the experiences of different jurisdictions to draw upon.

II. THE RECORD BELOW SQUARELY RAISES THE ISSUE OF THE WARRANTLESS SEARCH OF THE LUGGAGE AND PACKAGES IN THE LUGGAGE COMPARTMENT.

A. The Issue Was Properly Raised Below.

Respondent claims that "Petitioner made no objection to the introduction of the seized evidence at either the suppression hearing or the trial on the ground he claims here." (*Opposition To Petition For Writ of Certiorari,* p. 11.) Respondent is mistaken. Petitioner raised the issue of the warrantless search of the luggage compartment at every possible level: once to the Municipal Court, once to the Superior Court, to the California Court of Appeal, and to the Supreme Court of California. As we point out momentarily, the Court of Appeal squarely considered and denied our constitutional point without any discussion of how it was raised below.

Thus, at the January 15, 1975 Preliminary Hearing in the Municipal Court defense counsel objected to the search of the articles taken from the luggage compartment on the specific ground that "It was a search without warrant.":

> Mr. Ross: (Defense Counsel) I would object to all the articles taken from the rear compartment of the stationwagon being introduced into evidence.
>
> Mr. Ross: . . . The compartment, your Honor, if I might ask your [the People's] stipulation at this time. I notice we didn't ask in the testimony, it was sort of obvious, a stipulation that this wasn't a warranted search. It was a search without a warrant. (P.H. 26)[1]

[1]The following designations have been used in this brief: P.H. (Reporter's Transcript of Preliminary Hearing); R.T.S. (Reporter's Transcript of Special Suppression Hearing); R.T. (Reporter's Transcript on Appeal).

The Municipal Court nevertheless upheld the search on the ground that there was "reasonable cause to search for contraband." (P.H. 27) The Court, however, specifically reserved counsel's objection for the record. (P.H. 26)

The objection was made a second time in the Superior Court Suppression Hearing, wherein the matter was submitted on the basis of the transcript of the Preliminary Hearing. (R.T.S. 3:5-6; 4:1-7)

On appeal this issue was again raised *and passed upon* by the California Court of Appeal. (See Opinion of the Court of Appeal, reproduced in the Appendix to the *Petition for A Writ of Certiorari,* at p. v.) The objection was again made to the Supreme Court of California in the petition for hearing which that court denied.

B. There Was No Consent To The Challenged Search.

Not once, in the face of petitioner's objections to the warrantless search, has the State ever contended that petitioner consented to the warrantless search. Thus the California Court of Appeal did not mention or pass upon the consent question. It is therefore grossly inaccurate for the State to characterize its own course of action in not previously claiming that there was consent as based upon a "deficiency in the record." (Brief in Opposition, pp. 12-13) The State's right to claim consent to an illegal search has simply been waived.

The reasons for the State's failure to urge this point at any level below are, moreover, obvious from the record. Thus, while Robbins allegedly told the police that "what they are looking for is in the back," the circumstances leading up to this statement and Robbins' "vulnerable subjective state" (see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226, 229) at the time clearly establish that there was no free and voluntary waiver of a constitutional right within the meaning of the *Schneckloth* case.

Prior to his alleged making of the statement Robbins was kept spread-eagle against his still running car, breathing in the noxious fumes from its exhaust. (P.H. 7:11-16; R.T.S. 10:21-25; R.T. 80: 17-18) Robbins was overcome by these fumes and fell into the middle of the oncoming roadway where he vomited. (P.H. 10:17-18; R.T.S. 13:12-17) He was removed from the middle of the roadway and handcuffed but still kept outside in the cold. (R.T.S. 9:26-27; R.T.S. 15:12-28; P.H. 10:19-20) Immediately prior to making the alleged statement he was seen to be swallowing rapidly and perspiring profusely, saying irrational things and looking wild-eyed. (R.T.S. 14:15-16; 15:12-17; P.H. 26-28)

C. The Contraband Was Not In Plain View.

It is likewise surprising that the State should attempt to benefit from a second so-called "deficiency in the record" on account of its own failure to ever urge below that the sealed packages were "contraband in plain view." (*Opposition To Petition For Writ Of Certiorari,* at pp. 12-23) Whatever rights the State may have once had to make such a contention must now be deemed waived. The "plain view" contention also strains plain English. Each of the opaque green packages were securely wrapped and tightly sealed. Their contents were never exposed to "plain view." (P.H. 13-14, 23-24)

Respondent, indeed, confuses the concept of "probable cause" with the concept of "plain view." But even in terms of probable cause, there was much less probable cause in this case than in *United States v. Chadwick,* 433 U.S. 1, where the container was leaking a suspicious powder and a trained dog indicated the presence of marijuana within the container.

The record, moreover, does not support a claim that Officer DePue was attracted to the green packages. Thus although the District Attorney attempted to elicit from DePue a contention that he was attracted to the green packages, DePue did not so testify and instead discredited as "merely hearsay" statements that he had heard that contraband is sometimes packaged in this manner:

> Q: (District Attorney) . . . [N]othing about these two plastic wrapped green blocks that attracted your attention?
>
> A: (DePue) I had previous knowledge of transportation of such blocks. Normally contraband is wrapped in this way, merely hearsay. I had never seen them before. (P.H. 24)

The record, moreover, decisively establishes that DePue's attention was less attracted to the two sealed packages than to the other objects in the luggage compartment. Thus, according to DePue, when he opened up the luggage compartment he observed four objects "lying side by side" and "spread out within the area" of the compartment: a tote bag, a brown leather briefcase, and two green packages. (P.H. 22-24) DePue's attention was first attracted to the tote bag which he opened up. (P.H. 11:12-26; R.T. 51:24-27) His attention was next attracted to the Mason

jars and white plastic packages inside the tote bag, which items he next opened up. (R.T. 51-55) His attention then turned to the brown leather briefcase wherein he examined petitioner's clothing. (P.H. 13:17-18; R.T. 54:28-55:9) It was only at this point, after all the other items in the luggage compartment had been removed and examined, that DePue's attention was attracted to the sealed packages and he opened them. (P.H. 13:19-20; R.T. 55:10-13)

D. Retroactivity Arguments Are Not Applicable.

Respondent finally claims that the petition should not be granted since the search of the luggage compartment occurred prior to *United States v. Chadwick,* 433 U.S. 1. The date of the search does not make the issue under the Warrant Clause any more, or less, justiciable. In *Sanders v. State of Arkansas,* No. 77-1497, the issue is already joined before this Court in the context of a pre-*Chadwick* search.

Most importantly, *United States v. Chadwick,* carefully anticipated this problem by describing its holding as no more than a restatement of "settled constitutional principle." 433 U.S. 1, at 11. This language was noted and followed by the Eighth Circuit, en banc, in *United States v. Schleis,* 582 F.2d 1166, 1173 (1978). There is a split of authority among circuit courts on this question (see *United States v. Choate,* 576 F.2d 165, 182, n. 20 (9th Cir. 1978); *United States v. Berry,* 571 F.2d 2, 3 (7th Cir. 1978)), but as the Eighth Circuit pointed out in *Schleis,* that case would not have been remanded to the Court of Appeals had *Chadwick* not been retroactive. 582 F.2d at 1173, n.6.

For these reasons a Writ of Certiorari should be granted.

Dated: December 20, 1978.

Respectfully submitted,

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